

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ELTON J. GUMM</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 169,535
<b>GEORGE M. MYERS, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>TRAVELERS INSURANCE COMPANY</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

The Kansas Workers Compensation Fund appeals from an Award entered by Administrative Law Judge Nelsonna Potts Barnes on February 9, 1996.

**APPEARANCES**

Dale V. Slape of Wichita, Kansas, appeared on behalf of claimant. Lyndon W. Vix of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier. Cortland Q. Clotfelter of Wichita, Kansas, appeared on behalf of the Kansas Workers Compensation Fund.

**RECORD AND STIPULATIONS**

The Appeals Board reviewed the record listed in the Award and also adopted the stipulations listed in the Award.

**ISSUES**

The claimant suffered a diabetic crash with resulting peripheral neuropathy and damage to his hands, feet, and memory. Claimant worked for respondent as a mechanic, working on vehicles respondent used in its business. Claimant attributes the diabetic crash to a change in working conditions which occurred when he was assigned to a highway construction project near Topeka. The Administrative Law Judge awarded benefits for a permanent total disability and assessed all the liability against the Kansas Workers Compensation Fund. On appeal the Fund asks the Board to review the following issues:

- (1) Whether claimant met with personal injury by accident on August 5, 1992.
- (2) Whether the alleged accidental injury arose out of and in the course of claimant's employment with respondent.
- (3) Whether claimant is entitled to temporary total disability benefits.
- (4) The nature and extent of claimant's disability.
- (5) Liability, if any, of the Kansas Workers Compensation Fund.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board finds that the Award by the Administrative Law Judge should be reversed. The Appeals Board concludes that the claimant's injuries did not arise out of his employment. K.S.A. 1992 Supp. 44-501. The Board also concludes that the diabetic crash is not compensable as an occupational disease because it did not result from the nature of the employment. K.S.A. 44-5a01. The above conclusions render moot the other issues listed by the Fund.

Claimant, an insulin-dependent diabetic since 1983, began working for respondent as a diesel engine mechanic in May of 1991. He suffered a diabetic crash while working at a Topeka project in August of 1992. Before being assigned to the Topeka project, claimant often worked in the shop but also worked on occasion at construction projects, such as the ones in Mulvane and El Dorado.

In approximately May of 1992, claimant began working at the Topeka project and, while there, lived in a motel. Claimant contends that while on the Topeka project he was required to work longer hours and at a faster pace. He has presented expert medical opinion testimony stating that the longer hours and faster pace made the control of his diabetes more difficult and contributed to the diabetic crash. The Appeals Board finds from the record that claimant did, in fact, work longer hours while at the Topeka project as shown by Exhibit 1 to the transcript of the Regular Hearing. While working on the Topeka project he worked an average of 68.95 hours per week, excluding the last partial week worked. For the 15 weeks preceding that project, he worked 63.9 hours per week. The Appeals Board finds, however, that claimant did not work at a faster pace than he had before. This conclusion is based upon

the testimony of James L. Sparks and Bill McClendon, both supervisory personnel with George M. Myers. The Appeals Board also finds, based upon claimant's own testimony, as well as that of his supervisors, that the work did not prevent claimant from eating and taking insulin as needed to control his diabetes.

To be compensable, an injury must arise out of and in the course of employment. K.S.A. 1992 Supp. 44-501. The requirements that an injury "arise out of" and "in the course of" employment are separate and distinct requirements. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837 (1984). There appears to be little dispute that claimant's diabetic crash arose in the course of his employment. The evidence suggests that the symptoms began while claimant was at work and caused him to leave work and go to his motel.

As above indicated, however, the Appeals Board concludes that claimant's injuries did not "arise out of" his employment. The phrase "out of" employment requires a causal connection between the injuries and the nature, conditions, obligations, and incidents of employment. Craig v. Electrolux Corporation, 212 Kan. 75, 510 P.2d 138 (1973).

The Appeals Board finds there is no causal connection between the employment and the problems suffered from claimant's diabetic crash. The Board notes Leon R. Lapointe, M.D., has opined that one cannot necessarily make a connection between the diabetic crash and the peripheral or polyneuropathy. The peripheral neuropathy was the basis of claimant's disability. The Appeals Board has not, however, based its decision on the testimony of Dr. Lapointe.

The Appeals Board finds more convincing the testimony and opinions expressed by William C. Koller, M.D. Dr. Koller testified that the less control the person has over the diabetes the more likely it is the individual will have side effects such as the peripheral nerve damage suffered by the claimant. Dr. Koller was asked why the claimant's condition did not return to normal when his diabetes was brought under control after the diabetic crash. He answered that the most logical explanation was that the claimant suffered some irreversible neurological damage when his diabetes was out of control in August 1992, the time of the diabetic crash.

Dr. Koller further testified that the working conditions made it more difficult for claimant to control his diabetes. The Appeals Board has concluded, however, that the record, as a whole, including the testimony of Dr. Koller and the testimony of Terry L. Summerhouse, D.O., does not establish the causal connection required to bring claimant's injuries under the Kansas Workers Compensation Act. In our view, the cause of claimant's diabetic crash was claimant's own failure to maintain a proper diet and insulin intake. Claimant's work allowed him to do this. He simply failed to do so. Under these circumstances, the Board is unable to say that the work caused the diabetes to become out of control. Even if controlling the diabetes by diet and insulin was somewhat more inconvenient, the Board finds the circumstances did not establish the necessary nexus between work and lack of control over the diabetes.

The circumstances of this case differ from those where, for example, a claimant might violate his lifting restrictions and suffer injury. In those cases, as here, the claimant's injury

may be caused by the claimant's own failure to comply with limitations recommended by the physician. In such a case, however, the claimant is performing a duty for the employer which precipitates the injury. In this case, the failure to maintain a proper diet and insulin intake did not advance any interest to the employer. The employment allowed claimant to take the insulin and eat meals as necessary. The Board, therefore, finds that the injury did not arise out of employment.

The evidence establishes that, among other problems, claimant suffered carpal tunnel syndrome. The medical evidence, including the testimony of Dr. Koller, connects the carpal tunnel to the diabetes. Michael P. Estivo, D.O., also suggests that the carpal tunnel might have been caused by either the diabetes or the work activities themselves. If the carpal tunnel were caused by work activities it would be compensable. Dr. Estivo's testimony does not, however, establish the work activities as the most probable cause of claimant's carpal tunnel syndrome. The testimony, therefore, fails to meet the claimant's burden on this issue.

The Appeals Board, therefore, concludes that claimant's application for workers compensation benefits must be denied on the grounds that his injuries did not arise out of his employment.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes, dated February 9, 1996, should be, and is hereby, reversed.

#### **IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dale V. Slape, Wichita, KS  
Lyndon W. Vix, Wichita, KS  
Cortland Q. Clotfelter, Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director